SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 621.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR.

vs.

JAMES H. STRANG, HENRY C. THOMAS AND LEROY W. WALTER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

INDEX.

	Original.	Print.
Indictment	1	1
Demurrer of Leroy W. Walter to indictment	8	5
Demurrer of James H. Strang to indictment	9	6
Order sustaining demurrers	11	7
Petition for writ of error	12	8
Order allowing writ of error	14	8
Assignment of errors	15	9
Notice of filing directions	17	10
Copy writ of error	18	10
Copy of citation	19	11
Directions for preparing record	20	12
Clerk's certificate	22	12
Original writ of error	23	13
Return to writ of error	24	13

1 In the District Court of the United States of America in and for the Southern District of Florida, Special June term thereof, A. D. 1919, held at Jacksonville, Florida.

The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the Southern District of Florida, upon their oaths present:

That one James H. Strang was on the 10th day of February, 1919, a member of a firm known as Duval Ship Outfitting Company; that while a member of said firm he, the said James H. Strang, on the said 10th day of February, A. D. 1919, at and in the district aforesaid, acted as an agent of the United States in the transaction of business with the said Duval Ship Outfitting Company in the manner following, that is to say, he, the said James H. Strang, as and while an employee of the United States Shipping Board Emergency Fleet Corporation in the capacity of inspector, executed and signed a certain order in the words and figures following, to wit:

FEBRUARY 10, 1919.

From: Southeastern district, Jacksonville, Florida. E. K. Sharlow, assistant in charge ship construction, Emergency Fleet Corporation.

To: Duval Ship Outfitting Company, Jacksonville, Fla.

This will be your authority to do all necessary work on decks, houses, and in holds on S. S. "Lone Star" according to specifications which will be furnished to you as soon as possible.

Yours, very truly,

E. K. SHARLOW,

2 *Assistant in Charge Ship Construction.*

By J. H. STRANG, *Chief Inspector.*

And the jurors aforesaid upon their oaths aforesaid further present that one Henry C. Thomas and Leroy W. Walter, at and in the district aforesaid and within the jurisdiction of this court, well knowing the premises, did then and there on the said 10th day of February, A. D. 1919, aid and abet the said James H. Strang the said offense in the manner and form aforesaid to do and commit, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second count.

And the grand jurors aforesaid upon their oaths aforesaid do further present:

That one James H. Strang was on the 18th day of February, 1919, a member of a firm known as Duval Ship Outfitting Company; that while a member of said firm he, the said James H. Strang, on the said 18th day of February, 1919, at and in the district aforesaid, acted as an agent of the United States in the transaction of business with

the said Duval Ship Outfitting Company in the manner following, that is to say, he, the said James H. Strang, as and while an employee of the United States Shipping Board Emergency Fleet Corporation in the capacity of inspector, executed and signed a certain order in the words and figures following, to wit:

FEBRUARY 18, 1919.

From: Southeastern district, Jacksonville, Fla. E. K. Sharlow, district supervisor, Emergency Fleet Corporation.

3 To: Duval Ship Outfitting Company. Attention Mr. Lippman.

You are hereby given permission to work necessary men on work of the S. S. "Lone Star" ten hours per day.

Yours, very truly,

E. K. SHARLOW,
District Supervisor.
By J. H. STRANG,
Traveling Inspector.

And the jurors aforesaid upon their oaths aforesaid further present that one Henry C. Thomas and Leroy W. Walters, at and in the district aforesaid and within the jurisdiction of this court, well knowing the premises, did then and there on the said 18th day of February, A. D. 1919, aid and abet the said James H. Strang the said offense in the manner and form aforesaid to do and commit, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Third count.

And the grand jurors aforesaid upon their oaths aforesaid do further present:

That one James H. Strang was on the 19 day of February, 1919, a member of a firm known as Duval Ship Outfitting Company; that while a member of said firm he, the said James H. Strang, on the said 19 day of February, 1919, at and in the district aforesaid, acted as an agent of the United States in the transaction of business with the said Duval Ship Outfitting Company in the manner following, that is to say, he, the said James H. Strang, as and while an employee of the United States Shipping Board Emergency Fleet

4 Corporation in the capacity of inspector, executed and signed a certain order in the words and figures following, to wit:

FEBRUARY 19, 1919.

From: Southeastern district, Jacksonville, Fla. E. K. Sharlow, district supervisor, Emergency Fleet Corporation.

To: Duval ship outfitting yard, Jacksonville.

In reference to overtime on S. S. "Lone Star" you will be permitted to provide necessary overtime on this work provided that

time and a half is paid on all overtime work. As this boat has never been accepted by the U. S. Shipping Board as a completed ship you still are working under the rules set down in the Macey award.

Yours, very truly,

E. K. SHARLOW,
District Supervisor.
By J. H. STRANG,
Traveling Inspector.

And the jurors aforesaid upon their oaths aforesaid further present that one Henry C. Thomas and Leroy W. Walter, at and in the district aforesaid and within the jurisdiction of this court, well knowing the premises, did then and there on the said 19th day of February, A. D. 1919, aid and abet the said James H. Strang the said offense in the manner and form aforesaid to do and commit, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fourth count.

And the grand jurors aforesaid upon their oaths aforesaid do further present:

That on the 10 day of February, 1919, James H. Strang, Henry C. Thomas, and Leroy W. Walter at and in the district aforesaid combined agreed, and conspired together to commit an offense against the United States, that is to say, that the said James H. Strang while a member Duval Ship Outfitting Company act as the agent of the United States in the transaction of business with the said Duval Ship Outfitting Company in the making of contracts with and the giving of orders to said Duval Ship Outfitting Company for certain repairs and alterations, a further description of said repairs and alterations being to the jurors unknown, to be made upon, in, and about a certain vessel theretofore constructed by the United States Shipping Board Emergency Fleet Corporation, known and designated by the name "Lone Star," and for the furnishing of certain work, labor, services, and materials, a further description thereof being to the jurors unknown, in the making of said repairs and alterations in and upon said vessel "Lone Star."

And the jurors aforesaid upon their oaths aforesaid further present that in pursuance of said unlawful combination, agreement, and conspiracy, and to effect the object thereof, the said James H. Strang on the 10th day of February, 1919, at and in the district aforesaid and within the jurisdiction of this court, signed and executed a certain order in the following words and figures, to wit:

FEBRUARY 10, 1919.

From: Southeastern district, Jacksonville, Florida. E. K. Sharlow, assistant in charge ship construction, Emergency Fleet Corporation.

To: Duval Ship Outfitting Company, Jacksonville, Fla.

This will be your authority to do all necessary work on decks, houses, and in holds on S. S. "Lone Star" according to specifications which will be furnished to you as soon as possible.

Yours, very truly,

6 E. K. SHARLOW,
Assistant in Charge Ship Construction.
By J. H. STRANG,
Chief Inspector.

That in further pursuance of said unlawful combination, agreement, and conspiracy, and to effect the object thereof, the said James H. Strang, on the 28th day of February, 1919, at and in the district aforesaid and within the jurisdiction of this court, signed and executed a certain order in the following words and figures, to wit:

FEBRUARY 18, 1919.

From: Southeastern district, Jacksonville, Fla. E. K. Sharlow, district supervisor, Emergency Fleet Corporation.

To: Duval Ship Outfitting Company. Attention Mr. Lippman.

You are hereby given permission to work necessary men on work of the S. S. "Lone Star" 10 hours per day.

Yours, very truly,

E. K. SHARLOW,
District Supervisor.
By J. H. STRANG,
Traveling Inspector.

That in further pursuance of said unlawful combination, agreement, and conspiracy, and to effect the object thereof, the said James H. Strang on the 19th day of February, 1919, at and in the district aforesaid and within the jurisdiction of this court, signed and executed a certain order in the following words and figures, to wit:

FEBRUARY 19, 1919.

From: Southeastern district, Jacksonville, Fla. E. K. Sharlow, district supervisor, Emergency Fleet Corporation.

7 To: Duval ship outfitting yard, Jacksonville.

In reference to overtime on S. S. "Lone Star" you will be permitted to provide necessary overtime on this work provided that time and a half is paid on all overtime work. As this boat has never been accepted by the U. S. Shipping Board as a completed ship you still are working under the rules set down in the Macey award.

Yours, very truly,

E. K. SHARLOW,
District Supervisor.
By J. H. STRANG,
Traveling Inspector.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

H. S. PHILLIPS,
United States Attorney.

(Endorsed on back:) The United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Indictment. Government agent doing business with firm of which he is a member. Sec. 41 and 332, Penal Code. Conspiracy to violate sections 41 and 332, Penal Code. Section 37, Penal Code. A true bill. W. E. Terry, foreman. Filed this 25 day of June, A. D. 1919. Edwin R. Williams, clerk. Bail, $2,500 each. Rhydon M. Call, judge.

8 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA
vs.
LEROY W. WALTER ET AL. } Indictment No. ——

Demurrer to indictment and each count thereof.

And now comes Leroy W. Walter in his own proper person into court, and by his attorney, John W. Dodge, and having heard said indictment read, says that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, and that he, the said Leroy W. Walter, is not bound by the law of the land to answer the same, and this he is ready to verify; and he here shows to the court:

1st. Said indictment fails to set forth or charge any crime or offense against the laws of the United States.

2nd. There are not sufficient facts alleged in said indictment and each count thereof, charging any offense or crime under the laws of the United States.

Wherefore for want of sufficient indictment in this behalf the said Leroy W. Walter prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment and each count thereof specified.

JNO. W. DODGE,
Attorney for Defendant Leroy W. Walter.

(Endorsed on back:) United States vs. Leroy W. Walter et al. Demurrer to indictment and each count. Indictment No. 986. Filed September 17, 1919. Edwin R. Williams, clerk.

9 In the United States District Court, Southern District of Florida.

UNITED STATES OF AMERICA
vs.
JAMES H. STRANG ET AL.

Demurrer to indictment No. 986.

The defendant James H. Strang demurs to the indictment found against him in the above-styled case, No. 986, and each count thereof, and says that the said indictment is insufficient in law on the following grounds:

1. The said indictment does not set out facts constituting a criminal offense on the part of this defendant against the laws of the United States, as charged therein.

2. Said indictment does not allege facts constituting a criminal conspiracy under and against the laws of the United States.

3. The conspiracy is not sufficiently charged.

4. The conspiracy is not charged clearly and definitely enough to enable the defendant to make his defense.

5. That part of the indictment charging conspiracy is so vague that this trial, whatever the result might be, would not protect said defendant against a subsequent prosecution.

6. Said indictment shows on its face that this defendant was not an agent of the United States Government, as alleged therein, but was agent for a corporation under the laws of the District of Columbia.

10 ALEXANDER & MARTIN,
Attorneys for James H. Strang.

I, John W. Martin, of counsel for defendant James H. Strang, certify that in my opinion the foregoing demurrer is well founded in law.

JOHN W. MARTIN,
Attorney for Defendant James H. Strang.

STATE OF FLORIDA,
County of Duval, ss:

Before me this day came James H. Strang, who being first duly sworn, says that he is the above-named defendant, and that the foregoing demurrer is not interposed for the purpose of delay.

JAMES H. STRANG.

Sworn to and subscribed before me this 2nd day of October, 1919.

[SEAL.] GARY W. ALEXANDER,
Notary Public, State of Florida at Large.

My commission expires 6-14-22.

(Endorsed on back:) United States of America vs. James H. Strang et al. Demurrer to indictment No. 986. Alexander & Martin, attorneys for defendant. Filed October 2, 1919. Edwin R. Williams, clerk.

11 In the United States District Court, Southern District of Florida.

THE UNITED STATES
vs.
JAMES H. STRANG ET AL. | No. 996.

This cause coming on to be heard upon the demurrers of LeRoy W. Walter and James H. Strang, and the same having been argued and submitted:

It is considered by the court that said demurrers be and each of them is hereby sustained.

Done this October 15, 1919.

RHYDON M. CALL,
District Judge.

The first three counts of this indictment charge that the defendant, James H. Strang, while a member of a certain firm and while acting as an employee of the United States Shipping Board Emergency Fleet Corporation, entered into a contract with said firm on behalf of said corporation, and that the other two defendants aided and abetted him. The fourth count charges that the defendants entered into a conspiracy to commit the offense charged in the first three counts.

The decision of this demurrer depends primarily upon whether James H. Strang was an officer or agent of the United States at the time the acts attributed to him were done. It is clear that he was not an officer. Was he then an agent? The United States Shipping Board Emergency Fleet Corporation is a corporation created for public purposes, and, so far as my information goes, the United States is the sole stockholder; but it is a legal entity with powers to sue and be sued. It employs its agents, prescribes their duties, and fixes their compensation. I can not see by what course of reasoning its employees can be held to be the agents of the United States. If not, then no crime is charged in the first three counts, and consequently the fourth count does not charge a conspiracy to violate an act of Congress.

RHYDON M. CALL,
District Judge.

(Endorsed on back:) United States vs. James H. Strange et al. Order sustaining demurrer. Filed October 15, 1919. Edwin R. Williams, clerk.

12 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES H. STRANG, HENRY C. THOMAS, AND LEROY W. WALTER, defendants.

To the Honorable Rhydon M. Call, judge of said court:

Comes now the United States of America, by H. S. Phillips and Fred Botts, United States attorneys for the Southern District of Florida, and respectfully shows that on the 15th day of October, A. D. 1919, the court made an order in said cause sustaining the demurrers of Leroy W. Walter and James H. Strang to the indictment in said cause.

And your petitioner, feeling itself aggrieved by the said ruling of the court entered therein as aforesaid, herewith petitions the court for an order allowing the United States of America to prosecute a writ of error to the Supreme Court of the United States under the law in such cases made and provided.

The premises considered, your petitioner prays that a writ of error do issue in this behalf to the Supreme Court of the United States sitting at Washington for the correction of the errors complained of and herewith assigned.

H. S. PHILLIPS,
FRED BOTTS,
United States Attorneys for Petitioner in Error.

13 United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Petition for writ of error. Filed November 10, 1919. Edwin R. Williams, clerk.

14 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES H. STRANG, HENRY C. THOMAS, and Leroy W. Walter, defendants.

Order allowing writ or error.

The foregoing cause coming on this day to be heard upon petition for a writ of error and the assignments of error submitted therewith, it is, upon consideration thereof, ordered that said petition be granted and that a writ of error be allowed.

Done and ordered this 10th day of November, A. D. 1919.

RHYDON M. CALL,
United States District Judge.

United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Order allowing writ of error. Filed November 10, 1919. Edwin R. Williams, clerk.

15 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES H. STRANG, HENRY C. THOMAS, and Leroy W. Walter, defendants.

Assignment of errors.

Comes now the United States of America, plaintiff in said cause, by H. S. Phillips and Fred Botts, United States attorneys for the Southern District of Florida, and in connection with the plaintiff's petition for a writ of error in this cause assigns the following errors upon which plaintiff in error relies to reverse the judgment of the court herein, as appears of record, to wit:

1. The court erred in sustaining the demurrer of the said Leroy W. Walter to the indictment in said cause.

2. The court erred in sustaining the demurrer of James H. Strang to the indictment in said cause.

3. The court erred in holding that the allegations in the indictment were not sufficient to show that the said James H. Strang was an officer of the United States.

4. The court erred in holding that the allegations in the
16 indictment were not sufficient to show that the said James H. Strang was not an agent of the United States.

5. The court erred in holding that the allegations in the indictment were not sufficient to show that James H. Strang was an officer or agent of the United States within the meaning of section 41 of the Penal Code as amended.

6. The court erred in the construction placed upon section 41 of the Penal Code as amended in holding that an officer or agent of the United States Shipping Board Emergency Fleet Corporation was not such an officer or agent of the United States as is contemplated by section 41 of the Penal Code of the United States as amended.

Wherefore the United States, as plaintiff in error, prays that the judgment of said court be reversed.

H. S. PHILLIPS,
FRED BOTTS,
United States Attorneys for the Southern District of Florida for Plaintiff in Error.

(Endorsed on back:) United States vs. James H. Strang, Henry C. Thomas and Leroy W. Walter. Assignment of errors. Filed November 10, 1919. Edwin R. Williams, clerk.

17 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES H. STRANG, HENRY C. THOMAS, and Leroy W. Walter, defendants.

To John W. Dodge, Esquire, Attorney for Leroy W. Walter, and Messrs. Alexander & Martin, Attorneys for James H. Strang:

You and each of you will please take notice that I have on this, the 10th day of November, A. D., 1919, filed with the clerk of said court directions for making up transcript of record in said cause, copy of which directions are being hereto attached.

H. S. PHILLIPS,
FRED BOTTS,
United States Attorneys.

Received copy of the foregoing notice, together with copy of directions to the clerk for making up transcript of record, this 10th day of November, A. D., 1919.

JNO. W. DODGE,
Attorney for Leroy W. Walter.
ALEXANDER & MARTIN,
Attorneys for James H. Strang.

(Endorsed on back:) United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Notice of filing directions with clerk for making up transcript of record. Filed November 10, 1919. Edwin R. Williams, clerk.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Fifth Circuit, Southern District of Florida, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between the United States of America and James H. Strang, Henry C. Thomas, and Leroy W. Walter, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openingly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 10th day of December, 1919, in the said Supreme Court, to be then and there held, that the record and proceedings

aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 10th day of November, in the year of our Lord one thousand nine hundred and nineteen.

EDWIN R. WILLIAMS,
Clerk U. S. District Court, Southern District of Florida.

Allowed by:

RHYDON M. CALL,
U. S. District Judge.

19 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA:

To James H. Strang, Henry C. Thomas, and Leroy W. Walter, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States District Court for the Southern District of Florida, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the United States of America as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable Rhydon M. Call, judge of the District Court of the United States for the Southern District of Florida, this 10th day of November, 1919.

[SEAL.]

RHYDON M. CALL,
U. S. District Judge.

Marshal's return.

Received this citation at Jacksonville, Fla., on November 11th, 1919, and executed the same at Jacksonville, Fla., on November 13, 1919, by serving a true copy of this original on the within named James H. Strang, by delivering said true copy to John W. Martin, his attorney of record, and by making known to him the contents hereof. I further executed this writ by personally serving a true copy of this original on the within named Leroy W. Walter.

N. H. BOSWELL,
U. S. Marshal.
By WILBUR CLEVELAND,
Deputy.

20 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES H. STRANG, HENRY C. THOMAS, AND LEROY W. WALTER, DEFENDANTS.

To Edwin R. Williams, Esquire, clerk of said court:

You are hereby requested to prepare transcript of record to be filed in the Supreme Court of the United States pursuant to the writ of error allowed in the above-styled cause, and include in such transcript of record the following, and no other, papers, to wit:

1. The indictment in said cause.
2. The demurrer of Leroy W. Walter to said indictment.
3. The demurrer of James H. Strang to said indictment.
4. The order of the court dated October 15, 1919, sustaining the demurrers severally of said Leroy W. Walter and said James H. Strang to said indictment.
5. The petition for a writ of error.
6. The order granting the writ of error.
7. The assignments of error.
8. Notice of defendants of the filing of directions with the clerk for making up transcript of record together with their receipt for a copy of the same.
9. The writ of error in said cause.
10. The citation to defendants in error.

21 11. These directions.

12. The clerk's certificate.

And you will omit all other papers.

H. S. PHILLIPS,
FRED BOTTS,
United States Attorneys for the Southern District of Florida for Plaintiff in Error.

(Endorsed on back:) United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Directions for making up transcript. Filed November 10, 1919. Edwin R. Williams, clerk.

22 United States District Court, Southern District of Florida.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said court, do hereby certify that the foregoing typewritten pages and part pages, numbered from

1 to 21, inclusive, constitute a true and correct copy of the original record and proceedings, including the assignment of errors, in a cause lately pending in this court wherein the United States of America is plaintiff and James H. Strang, Henry C. Thomas, and Leroy W. Walter are defendants as prepared according to the directions filed in said cause.

In witness whereof I hereunto set my hand and affix the seal of said court at Jacksonville, this 19th day of November, A. D. 1919.

[SEAL.] EDWIN R. WILLIAMS,
Clerk.

By W. L. DEVORE,
Deputy Clerk.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District of the United States for the Fifth Circuit, Southern District of Florida, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, or some of you, between the United States of America and James H. Strang, Henry C. Thomas, and Leroy W. Walter, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openingly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 10th day of December, 1919, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 10th day of November, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] EDWIN R. WILLIAMS,
Clerk U. S. District Court, Southern District of Florida.

Allowed by:

RHYDON M. CALL,
U. S. District Judge.

24 UNITED STATES OF AMERICA,
Southern District of Florida:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the United States District Court for the Southern District of Florida at Jacksonville this 1[illegible]ay of November, 1919.

[SEAL.]

EDWIN R. WILLIAMS,
Clerk U. S. District Court
Southern District of Florida.
By W. L. DEVORE, *D. C.*

(Endorsed:) United States District Court, Southern District of Florida. United States of America vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Writ of error. Office of the clerk, Supreme Court, U. S. Received Dec. 5, 1919.

(Endorsement on cover:) File No. 27376. S. Florida, D. C. U. S. Term No. 621. The United States of America, plaintiff in error, vs. James H. Strang, Henry C. Thomas, and Leroy W. Walter. Filed December 5th, 1919. [illegible] No. 27376.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
JAMES H. STRANG, HENRY C. THOMAS AND Leroy W. Walter.
No. 206.

IN ERROR TO THE DISTRICT COURT OR THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

UNITED STATES SHIPPING BOARD EMERGENCY Fleet Corporation, plaintiff in error,
v.
JOSEPH N. KINNEY.
No. 440.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the plaintiff in error in each of the above-named cases and respectfully moves the court to advance said cases for argument on an early day of the present term convenient to court.

No. 206 is a direct writ of error to the District Court for the Southern District of Florida under the criminal appeals act (act Mar. 2, 1907, 34 Stat., c. 2564, p. 1246) to review a decision of that court sustaining a demurrer to an indictment in four counts, charging defendants with violating and conspiring to violate section 41 of the Criminal Code, reading as follows:

> No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.

The first three counts charged that the defendant, Strang, while a member of a certain firm and while acting as an employee of the United States Shipping Board Emergency Fleet Corporation, entered into a contract with said firm on behalf of the Fleet Corporation, and that the other defendants aided and abetted him. The fourth count charged that defendants entered into a conspiracy to commit the offense charged in the first three counts.

The District Court (Judge Call) held, in substance, that an employee of the United States Shipping

Board Emergency Fleet Corporation (a corporation under the laws of the District of Columbia, of which the United States is sole stockholder) is not an officer or agent of the United States, within the meaning of section 41.

No. 440 is a direct writ of error to the District Court for the Eastern District of Pennsylvania under section 238 of the Judicial Code, the case being one involving the jurisdiction of said District Court as a Federal court, and the court having certified the question of jurisdiction to this court for determination.

The suit originated in the Court of Common Pleas of Philadelphia County and constitutes an attempt to sue the United States Shipping Board Emergency Fleet Corporation as garnishee. After removal to the District Court the Fleet Corporation moved to dismiss on the ground that the suit was in effect one against the United States, and consequently not within the jurisdiction of the court. The motion was overruled; and the Fleet Corporation having refused for the reason stated in its motion to answer the interrogatories of the plaintiff, judgment was entered against it for $6,000.

Case No. 206 being criminal is subject to be advanced under rule 28, paragraph 3; and Case No. 440, involving only the question of jurisdiction, is subject to be advanced under rule 32. In addition, both cases involve the question of the status of the Fleet Corporation and consequently of its suability, which question is one of general public importance, being

involved in numerous cases now pending in the lower Federal and State courts, and concerning which there exists a conflict of opinion among said courts.

Opposing counsel have been notified.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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CONTENTS.

	Page.
Statement	1
The statute	2
The indictment	2–3
Decision of the District Court	3
Specification of error	3
Brief	3–4
Argument	5–24
I. The Emergency Fleet Corporation is an agency of the United States	5–11
II. The Emergency Fleet Corporation has no other capacity than that of Government agent	11–17
III. An act of the Emergency Fleet Corporation is the act of the United States, and one acting in behalf of the Fleet Corporation necessarily acts as agent of the United States	18–20
IV. The case is within the mischief aimed at	20–24
Conclusion	24

CASES CITED.

Ballaine v. *Alaska Northern Ry. Co.*, 259 Fed. 183	15–16
Lake Monroe, The, 250 U. S. 246, 249–254	5–10, 18
Salas v. *United States*, 234 Fed. 842	13, 14
Sloan Shipyards Corp. v. *Emergency Fleet Corp.*, U. S. D. C. Wn. Wash., decided October 5, 1920, not yet reported	16, 17
United States v. *Carlin*, 259 Fed. 904	21, 22–23
United States v. *Union Timber Products Co.*, 259 Fed. 907	21, 23
United States Bank v. *Planter's Bank*, 9 Wheat. 904	13, 14
Wells v. *Roper*, 246 U. S. 335	20

STATUTES CITED.

	Page.
Act of September 7, 1916, 39 Stat. c. 451, p. 728	5, 12
Act of June 15, 1917, 40 Stat. c. 29, p. 182	5, 11
Act of April 22, 1918, 40 Stat. c. 62, p. 535	11
Act of July 15, 1918, 40 Stat. c. 152, p. 900	11
Act of July 15, 1918, 40 Stat. c. 157, p. 913	11
Criminal Appeals Act, 34 Stat. c. 2564, p. 1246	1
Criminal Code, section 37	3
Criminal Code, section 41	1, 2, 4, 20
Judicial Code, section 24, par. 20	16
Hearings, Senate Committee on Commerce, in re Shipping Board, Jan. 22, 1918, pp. 1109–1112	12

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
v.
JAMES H. STRANG, HENRY C. THOMAS, AND LEROY W. WALTER. } No. 206.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a direct writ of error to the District Court of the United States for the Southern District of Florida under the Criminal Appeals Act (act of March 2, 1907, c. 2564, 34 Stat., p. 1246), to review a decision of that court sustaining a demurrer to an indictment in four counts charging defendants in error with violating, and conspiring to violate, section 41 of the Criminal Code (embodying sec. 1783, R. S.).

THE STATUTE.

Section 41 of the Criminal Code reads as follows:

> No officer or agent of any corporation, joint stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than two thousand dollars and imprisoned not more than two years.

THE INDICTMENT.

The first three counts charge that the defendant, Strang, while a member of a firm known as Duval Ship Outfitting Company, and while employed by the United States Shipping Board Emergency Fleet Corporation in the capacity of an inspector, acted as an agent of the United States in the transaction of business with the Duval Company, in that, as such employee of the Emergency Fleet Corporation, he signed and executed three separate orders to the Duval Company for repairs and alterations on a vessel known as the "Lone Star." The other defendants are charged with having aided and abetted Strang. (Rec. 1-3.)

Count 4 is based on section 37 of the Criminal Code (embracing section 5440, R. S.) and charges the defendants with conspiring to commit an offense against the United States, to wit, the offense charged in the first three counts. (Rec. 3–5.)

DECISION OF THE DISTRICT COURT.

The District Court (Judge Call) sustained a demurrer to the indictment on the sole ground that the defendant, Strang, was not an agent of the United States at the time the acts attributed to him were done. The court recognized that the United States Shipping Board Emergency Fleet Corporation was created for public purposes and that its entire capital stock is owned by the United States, but held that because it is a separate corporate entity its employees could not be called agents of the United States. (Rec. 7.)

SPECIFICATION OF ERROR.

The foregoing ruling of the District Court constitutes the only error assigned or relied on by the United States. (Rec. 9.)

BRIEF.

The Government's contentions may be thus summarized:

1. The defendant Strang, in doing the acts set out in the indictment, was an agent of the United States.

(*a*) The United States Shipping Board Emergency Fleet Corporation (hereafter called Fleet

Corporation) is an agency or instrumentality of the United States.

(*b*) It was formed solely as an arm of the United States for the execution of purely governmental powers and duties vested by Congress in the President and by the President delegated to it.

(*c*) The acts of the Fleet Corporation, within the scope of its delegated authority, are the acts of the United States, as are the acts of any other regularly constituted agency or instrumentality of the Government.

(*d*) Wherefore, the defendant, Strang, in placing orders with the Duval Company on behalf of the Fleet Corporation, necessarily acted as an agent of the United States.

2. The acts charged in the indictment are within the mischief aimed at by the statute.

(*a*) Section 41 of the Criminal Code was designed to prevent frauds on the United States due to collusion between its agents and those with whom they transact business.

(*b*) The assets and property of the Fleet Corporation are the assets and property of the United States.

(*c*) Any fraud against the Fleet Corporation would be a fraud agains the United States.

(*d*) Wherefore, the acts charged in the indictment are directly within the mischief aimed at by Section 41.

ARGUMENT.

I.

The Emergency Fleet Corporation is an agency of the United States.

That the Emergency Fleet Corporation is an agency or instrumentality of the United States for the carrying out of governmental functions, and not a mere private trading corporation in which the Government happens to own stock, will appear from a brief review of the several statutes and executive orders providing for its formation and prescribing its powers and duties.

These statutes and orders have nowhere been more clearly or concisely summarized than in the opinion of this court in *The Lake Monroe*, 250 U. S. 246. While that case on its facts is not a direct authority upon the question here presented, the opinion leaves no doubt as to the view which this court entertained in regard to the status of the Fleet Corporation.

The case involved primarily the question whether the *Lake Monroe*, which had been requisitioned by the Fleet Corporation under the emergency shipping provision of June 15, 1917 (40 Stat., c. 29, p. 182), but which had been chartered to a private concern for use as a merchant vessel, was subject to a provision of the shipping act of 1916 (39 Stat., c. 451, p. 728), directing that all vessels

purchased, chartered, or leased from the Shipping Board—

> while employed as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels.

This court held that the *Lake Monroe* was subject to the foregoing provision and hence was liable to seizure in satisfaction of a claim for damages growing out of a collision. Reviewing the several acts and executive orders relating to the Shipping Board and Fleet Corporation, the court stated the history of the latter as follows (pp. 249–254):

> The act of September 7, 1916, passed before the United States entered the great war, but when our commerce already was feeling the ill effects of the world-wide shortage in shipping occasioned by that war, is entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." It created a board of five commissioners and authorized them (sec. 5), with the approval of the President, to cause to be constructed and equipped, in American shipyards or elsewhere, or to purchase, lease, or charter "vessels suitable, as far as the commercial

requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes," and also (sec. 7) to charter, lease, or sell to any citizen of the United States any vessel so purchased or constructed.

* * * * *

Section 11 authorized the Shipping Board to form one or more corporations under the laws of the District of Columbia for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States, the total capital stock not to exceed $50,000,000, and the board to acquire for and on behalf of the United States not less than a majority of the capital stock. The act contained numerous provisions imposing duties upon common carriers by water, and conferring powers of regulation upon the Shipping Board.

The members of this board were appointed by the President in December, 1916, and, having been confirmed by the Senate, were formally organized in the following month.

By the time the United States declared war, April 6, 1917, the world's merchant shipping had reached the stage of demoralization.

* * * * *

Soon after the declaration of war the Shipping Board, under authority of sec. 11 of the above act, caused to be organized (Apr. 16, 1917) under the laws of the District of

Columbia a corporation known as the United States Shipping Board Emergency Fleet Corporation, with $50,000,000 of capital stock, all owned by the United States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of that board.

In this state of affairs, Congress embodied in the urgent deficiencies appropriation act of June 15, 1917, c. 29, 40 Stat. 182, a clause entitled "Emergency Shipping Fund," which conferred upon the President broad powers of control over contracts for the building, production, or purchase of ships or material, and among others the power "To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship." Another clause declared: "The President may exercise the power and authority hereby vested in him • • • through such agency or agencies as he shall determine from time to time: *Provided*, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct."

Under this authority the President made an Executive order July 11, 1917, directing that the Fleet Corporation should have and exercise all power and authority vested in him by said provision, so far as applicable to the construction of vessels, the purchase or requisitioning of vessels in process of construction, and the completion thereof, and that the Shipping Board should exercise all power and authority vested in him by said provision, so far as applicable to the taking over of title or possession, by purchase or requisition, of constructed vessels or charters therein, and the operation, management, and disposition of such vessels, and of all others theretofore or thereafter acquired by the United States, declaring: "The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose."

* * * * *

But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. *The emergency shipping legislation evidently was enacted in the expectation that the President would*

> *employ the Shipping Board and the Fleet Corporation as his agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the board.* It is not necessary to hold that Congress, while entertaining this expectation, went to the extent of restricting the President to those agencies; but it is not to be believed that they intended he should exercise the powers arbitrarily. And when in fact he designated the Fleet Corporation to exercise those powers so far as they pertained to the construction of vessels and the requisitioning of vessels in process of construction, and the Shipping Board so far as they applied to the operation, management, and disposition of vessels, it is to be presumed that he did so because of the general powers that already had been conferred upon them by law, and because they were subject to the regulatory provisions that Congress had enacted. [Italics ours.]

By at least three acts of Congress passed and approved during the year 1918 the provisions of the emergency shipping provision were supplemented, and on December 3, 1918, the President issued a further Executive order gathering together all the powers that up to that date had been conferred on him in respect of the acquisition or construction of ships or plants and designating the Emergency Fleet Corporation as the agency for carrying out those powers. The powers conferred by these several acts were closely related to the

powers conferred by the emergency shipping provision and require no separate consideration. (See act of April 22, 1918, 40 Stat., c. 62, p. 535; act of July 15, 1918, 40 Stat., c. 152, p. 900; act of July 15, 1918, 40 Stat., c. 157, p. 913.)

The emergency shipping provision (40 Stat., c. 29, pp. 182, 183–184) carried the following authorizations and appropriations, which show that the operations of the Emergency Fleet Corporation were financed entirely with Government funds: For purchasing, requisitioning, etc., plants, material, charters, ships, etc., and expediting the construction of ships thus acquired, not to exceed $250,000,000, of which $150,000,000 was actually appropriated; for the construction of ships as therein authorized $500,000,000, of which $250,000,000 was actually appropriated; and for the operation of ships in any way acquired for the United States (except those for use of the Army or Navy), $5,000,000.

II.

The Emergency Fleet Corporation has no other capacity than that of Government agent.

It is not necessary at this late date to rehearse at great length the circumstances attending the enactment of the several statutes relating to the Emergency Fleet Corporation in order to demonstrate that it was formed for purely governmental purposes and clothed with purely governmental powers.

The Shipping Act of September 7, 1916 (39 Stat., c. 451, p. 728), under the authority of which the Emergency Fleet Corporation was formed, was purely a war measure. It was enacted at a time when the shipping of the world had suffered serious losses and was demoralized, and when it seemed inevitable that the United States would be drawn into the conflict. A primary purpose of the act was (sec. 5) to provide vessels "for use as naval auxiliaries or Army transports or for other naval or military purposes."

But even if it might be contended that the act of 1916 contemplated the formation of an ordinary commercial corporation to act as the operating agent of the Shipping Board, the plain answer would be that the Fleet Corporation was not formed for the purposes contemplated by that act. Prior to the declaration of war the Shipping Board had exercised none of its functions in respect of the acquisition, operation, etc., of merchant vessels and had not organized any corporation to act as its agent. (Hearings, Senate Committee on Commerce, in re Shipping Board, Jan. 22, 1918, pp. 1109–1112.) It was not until after the declaration of war that the Emergency Fleet Corporation was organized to become the agent of the President to execute the powers and duties which were to be conferred on him in respect of shipping, and until it was commissioned as such agency of the President it never functioned.

It is quite clear, therefore, that the Fleet Corporation is engaged in no other business than that of carrying out and executing its powers and duties pursuant to the statute of Congress and the order of the President. It has no private business, and no private person has any beneficial interest in it. It is, consequently, merely a substitute for the President—the instrument by which the United States carried out the powers conferred by the Emergency Shipping Act. It was, of course, manifestly impossible for the President to perform in person all the duties thrust upon him during the war. A vast organization had to be built up to exercise these functions for him, and the Fleet Corporation was merely one of the cogs in this great governmental war machine. It was the right hand and arm of the President, and its acts were the acts of the President, and consequently of the United States.

We are not, therefore, dealing with an ordinary commercial corporation in which the United States happens to own stock, or with a situation where the sovereign has thrown off the robe of sovereignty and become a partner in an ordinary commercial enterprise. We are here dealing with a corporate agent of the United States created for the exercise of purely governmental functions. The case, therefore, is plainly distinguishable from such cases as *U. S. Bank* v. *Planters' Bank,* 9 Wheat. 904, and *Salas* v. *United States* (C. C. A. 2nd Circuit), 234 Fed. 842, which are usually relied on by those seeking to establish that the Fleet Corporation is a mere

private corporation and which, we presume, will be cited by defendants in error here.

In the *Planters' Bank case* the State of Georgia and certain individuals—citizens of Georgia—engaged in the general banking business through said bank. The action was upon a promissory note held by the plaintiff and endorsed by the defendant, and the defendant bank pleaded immunity from suit because of its sovereign character. The court held that, having become a partner in a trading company, the State had divested itself of its sovereign character and had taken on that of a private citizen, and that, therefore, the defense of sovereignty could not be availed of.

In the *Salas case* it appeared that the United States owned the entire capital stock of the Panama Railroad Company. Through the commissary department of the railroad company supplies were bought and furnished to the employees on the Isthmus. Salas and Burke were indicted for a conspiracy to defraud the United States growing out of certain irregularities in the conduct of the commissary department. The Circuit Court of Appeals (Coxe and Ward, C. J., concurring, and Chatfield, D. J., dissenting), applying the principle of the *Planters' Bank case,* held that the mere fact that the United States owned the capital stock of a private trading company did not render a conspiracy to defraud such company a conspiracy to defraud the United States.

The distinction between a case where the United States merely acquires stock in a private corporation, and where it creates or acquires a corporation to act as its agent for purely governmental purposes, is well stated in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Ballaine* v. *Alaska Northern Ry. Co.*, 259 Fed. 183. That was a suit against the Alaska Northern Railway Co. for tort. The United States intervened by way of information, alleging that it had acquired the real and personal property and outstanding securities of the defendant, and that the latter was an agency of the United States and hence not liable in tort. The court, examining the several statutes relating to the railroad company, held that it had been acquired as an agency of the United States for governmental purposes; that therefore the United States was the real party in interest, and that the suit could not be maintained. The court said (p. 185):

> The Act of March 12, 1914, c. 37, heretofore cited, which authorizes the President to locate, construct, and operate railroads in Alaska, expressly provides that the Alaska railroad is for the settlement of public lands and for transportation of coal for the Army and Navy, for the transportation of troops, arms, munitions of war, the mails, and for "other governmental and public uses," and to transport passengers and property. The act (section 4) also confers authority upon

> the President, through such agents as he may appoint or employ, to do all necessary acts, in addition to those specially authorized, to enable him to accomplish the purposes of the act. By section 1 the President is authorized to purchase or acquire other railroads to carry out the purposes of the act, and to employ officers and agents in order to accomplish the purpose of the legislation. *Taking all these provisions together, they plainly show that the United States, in acquiring the stocks and bonds and property of the Alaska Northern Railway Company, acted in its sovereign capacity, and in exercising entire control, possession, ownership, and management, has merely employed the corporate organization as an agency through which to execute the purposes of the statute.* [Italics ours.]

This principle was recently applied by the District Court for the Western District of Washington in a suit against the Fleet Corporation. *Sloan Shipyards Corporation* v. *Emergency Fleet Corporation,* decided October 5, 1920, not yet reported. The court (District Judges Neterer and Cushman concurring) held that as the Emergency Fleet Corporation had no capacity save that of agent of the United States, it could not be sued in any case in which the United States had not consented to be sued, and that as the case involved more than $10,000 (the jurisdictional limit fixed by the Tucker Act, Judicial Code, sec. 24, par 20) the court was without jurisdiction. After pointing out that sig-

nificance attached to the fact that the Fleet Corporation was formed under the laws of the District of Columbia, which are laws of the United States, the court continued:

> The intent of the Congress in the agency employed and the directions given, the provisions of the act, and legislation with relation thereto, appear to be conclusive that the United States acted in its sovereign capacity; and in exercising entire control, possession, ownership, and management it has merely employed the corporate organization of its own creation so far as applicable as an instrumentality or " arm " with which to execute the purposes of this statute, and in so doing it was not divested of its sovereignty.
>
> * * * * *
>
> In the instant case the defendant is not a trading company. The primary purpose of the act [Shipping Act, 1916] was to provide "Army transports," and the commercial shipping was incidental. The act is a war measure; emergency is reflected in nearly every sentence. * * * Every detail of management, relation, and function of the defendant is prescribed and limited in the Marine Act, and the only use made of the incorporation act [secs. 605–640, D. C. Code], the creation of the Congress, was the filing of articles to give it corporate entity as a matter of convenience, and nowhere is there apparent an intention to waive the sovereign privilege.

III.

An act of the Emergency Fleet Corporation is the act of the United States, and one acting in behalf of the Fleet Corporation necessarily acts as agent of the United States.

The Fleet Corporation having no other capacity than that of Government instrumentality or agent, it is of no legal significance that it is a corporation.

That there is no legal difference between the Fleet Corporation and any other department, bureau, or agency of the Government is quite clear.

As pointed out in *The Lake Monroe*, 250 U. S. 246, 254, while Congress evidently passed the emergency shipping legislation in the expectation that the President would employ the Shipping Board and the Fleet Corporation as his agents, it did not restrict him in his choice.

Now if the President had chosen to exercise the powers thus conferred on him in person, or had delegated them to one of his cabinet, would it be contended that one employed by the President or his delegatee to enter into contractual relations with third persons was not an agent of the United States? Yet the President, or his delegatee, in such a case would possess all the attributes which the District Court in the present case enumerated as distinguishing the Fleet Corporation, namely, power to sue and be sued, to employ agents and prescribe their duties, and to fix their compensation. (Rec. 7.)

Again, as we have seen, the President delegated to the Shipping Board so much of the powers con-

ferred on him as related to the acquisition and operation of ships which had already been completed, with power to the board to exercise such powers either directly or through the Emergency Fleet Corporation. The Shipping Board was not a corporation but was an administrative department of the Government similar to the Interstate Commerce Commission and the Federal Trade Commission, consisting (as then constituted) of five commissioners. Would it be contended that an employee of the board acting for the board in respect of the matters confided to it was an agent of the board and not of the United States?

It can not be assumed that Congress in conferring such powers upon the President intended to leave to his discretion, or that the President in delegating a part of such powers to the board intended to leave to its discretion, the delegating of such powers to an agency which was not in contemplation of law an agency of the United States, and which was not subject to the several statutes enacted for the protection of Government funds and property and to prevent the perpetration of fraud.

It is a trite saying that the Government is incapable of acting otherwise than by agents. *Qui facit per alium facit per se,* also is a familiar maxim. Putting to one side mere artificialities and looking to the substance, it is obvious that contracts entered into and acts done by the Fleet Corporation are the contracts and acts of the United States. That is true of any other department or representative of

the Government; it is true of the Fleet Corporation. To illustrate: The Postmaster General in executing a contract for the furnishing of automobiles to collect the mails acts on behalf of the United States, which is the real party in interest; and a suit to enjoin the Postmaster General or his deputy from terminating such a contract is in effect a suit against the United States which can not be maintained without its consent. *Wells* v. *Roper*, 246 U. S. 335.

The acts and contracts of the Emergency Fleet Corporation being the acts and contracts of the United States, it follows that one negotiating such contracts on behalf of the Fleet Corporation acts on behalf of the United States and not of the Fleet Corporation merely, and is an agent of the United States. It is of no consequence that the governmental agency or representative which is the immediate party to such a contract is a Government owned corporation, a regularly established department or bureau of the Government, or an individual, since the contract, in the final analysis, is the contract of the United States.

IV.

The case is within the mischief aimed at.

Section 41 of the Criminal Code (embodying section 1783, R. S.) plainly was intended to prevent the perpetration of fraud upon the Government which it was deemed might result if identity of interest should exist between its representatives and those with whom they did business.

A very brief review of the essential facts will suffice to demonstrate that the present case is within the mischief aimed at by the statute:

(*a*) The orders placed by the defendant, Strang, with the Duval Ship Outfitting Company were to be paid for out of funds appropriated by Congress.

(*b*) The orders called for the doing of work on a vessel built for the Emergency Fleet Corporation and consequently owned by the United States.

(*c*) Any loss which might be occasioned by possible collusion between Strang and the Duval Company would be borne by the United States.

These considerations have moved the United States District Courts for the Eastern District of Pennsylvania (*United States* v. *Carlin*, 259 Fed. 904) and the Western District of Washington (*United States* v. *Union Timber Products Co.*, 259 Fed. 907) to hold that a conspiracy to defraud the Emergency Fleet Corporation constitutes a conspiracy to defraud the United States within the meaning of section 37 of the Criminal Code.

In the first-named case District Judge Thompson said:

> Under the terms of the contracts above referred to, the United States Shipping Board Emergency Fleet Corporation, being the agency designated by the President for carrying out the powers conferred upon him in the construction of ships and representing the United States, employed as its agent the American International Corporation, and the latter corporation, with the consent of

the United States Shipping Board Emergency Fleet Corporation, employed as its agent the American International Shipbuilding Corporation to carry out the construction contract.

The funds deposited by the United States Shipping Board Emergency Fleet Corporation under the construction contract for the payment, inter alia, of workmen's wages, were the funds of the United States which had been appropriated by Congress and authorized to be expended by the President through the agency determined by him. Through the authority delegated by him to the United States Shipping Board Emergency Fleet Corporation, under which it employed the American International Corporation as its agent, and under which the latter corporation employed the American International Shipbuilding Corporation as its agent, so much of the funds deposited as were used for payment of wages of workmen employed under the construction contract were a part of the funds of the United States and were expended by the corporation carrying out the contract only as agent for the United States.

Under the circumstances, a fraud, the effect of which was to fictitiously increase the total amount of the pay roll and therefore the contract actual cost of the shipyard at Hog Island or the vessels being constructed there, would by so much diminish the funds of the United States. The offense was therefore within the jurisdiction of this court

under the provisions of section 37 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. Sec. 10201).

And in the *Union Timber Products case* Judge Neterer said:

> Motion to quash is filed upon the ground, among others, that no offense is stated; it being contended that the corporation referred to is a business corporation organized under the laws of the District of Columbia, and is not a corporation created by the sovereign power for the express purpose of governmental functions, and hence the penal section invoked has no application.
>
> The Shipping Board Emergency Fleet Corporation is constituted by law an agency of the United States for the purpose of construction of vessels and entering into contracts for the use of vessels. Pursuant to law, the corporation was created to carry out the purposes of the act, and in furtherance of the plan and scheme, upon authority conferred, the corporation had the power and authority to enter into contracts for the construction of vessels and making expenditures of the funds appropriated by the Congress.
>
> The Supreme Court in the matter of the petition of the United States of America, owner of the America steamship *Lake Monroe* for writ of prohibition, June 12, 1919, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. —, said:
>
> " But at the time of the emergency provision of June 15, 1917 (section 3115 1/16 d,

Comp. St. 1918), the Shipping Board had been established as a public commission with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds."

The Shipping Board Emergency Fleet Corporation being the agency designated by the President for carrying out the powers conferred upon him in the construction of ships, *and* a conspiracy to defraud such corporation, financed with the funds of the United States, would be a fraud upon the United States.

In the Criminal Code section 41 is contained in Chapter IV, headed "Offenses against the operations of the Government." Section 37 of the code, providing for the punishment of conspiracies to defraud the United States is contained in the same chapter. Both have the same purpose and the one should be given as wide an application as the other.

CONCLUSION.

It is respectfully submitted, therefore, that the judgment of the District Court was erroneous and should be reversed.

WILLIAM L. FRIERSON,
Solicitor General.

A. F. MYERS,
Special Assistant to the Attorney General.

NOVEMBER, 1920.

○

In the Supreme Court of the United States

October Term, 1939

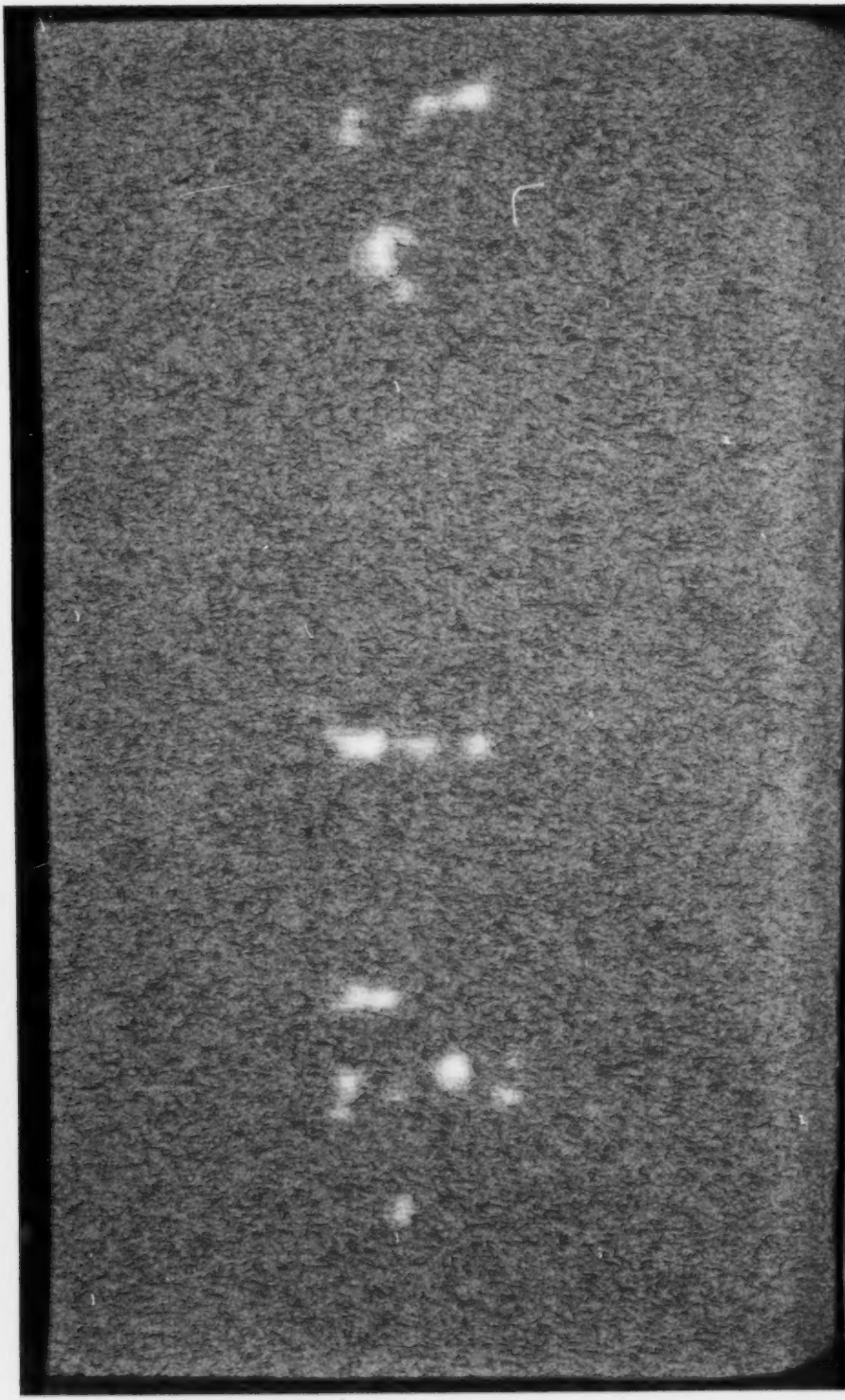
No. 206

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
JAMES H. STRANG, HARRY C. THOMAS and LEROY W. WALTER,
Defendants in Error.

In Error to the District Court of the United States in and for the Southern District of Florida.

REPLY BRIEF OF PLAINTIFF IN ERROR, FOR DEFENDANT LEROY W. WALTER.

JOHN W. DODGE,
Counsel.



INDEX.

Page

James H. Strang was not an officer of the United States.

U. S. vs. Hartwell, 6th Wall., 393 6

U. S. vs. Germaine, 124 U. S., 303 6

U. S. vs. Smith, 124, U. S., 525-33 7

U. S. vs. Strang, Call, Judge District Court 5

Constitution U. S., Art II, Sec. 2, Clause 2 7

James H. Strang was not an agent of the United States, merely an employee.

2 Corpus Juris pp. 420-421 9-12

1st Clark & Skyles on Law of Agency, pp. 8-10 14

1st Mechem on Agency, pp. 20-21-23-24 12-13-14

New Orleans vs. Hanning, 15 Wall., 649 14

Singer Mfg. Co. vs. Rahn, 132 U. S., 518 14

Before a man can be punished his case must be plainly and unmistakably within the Statute.

U. S. vs. Brewer, 139 U. S., 278 8

U. S. vs. Eaton, 144 U. S., 677 9

U. S. vs. Lacher, 134 U. S., 624 9

U. S. vs. Hartwell, 73 U. S., 385-402 9

The United States Shipping Board Emergency Fleet Corporation is not the United States, but a Corporation.

Briscoe et al. vs. Bank of Ky., 11 Peters, 257-327 20

Bank of U. S. vs. Planters Bank, 9 Wheaton, 904-7-8 18

Bank of Ky. vs. Wister, 2 Peters, 318 19

Curran vs. State of Arkansas, 15 How., 304-8-9 21

R. R. Co. vs. Iowa, 94 U. S., 155 23

Salas vs. U. S., 234 Fed. Rep., 842 23-24

Southern Ry. vs. N. C. R. Co., 81 Fed. Rep., 600 24

Lord & Burnham Co. vs. U. S. S. B. E. F. C., 265 Fed. Rep., 955 24

Ingram etc. vs. U. S. S. B. E. F. C., 267 Fed. Rep., 283 24

White vs. R. R. Co., 7 Heisk, 547 24

W. A. R. R. Co. vs. Taylor, 6 Heisk, 415 25

Indictment fails to allege whose property, as in Lake Monroe case.

Lake Monroe case, 250 U. S., 246 30

U. S. Shipping Board Emergency Fleet Corporation was not an agency but a separate legal entity which could be sued 25-26

The indictment does not allege Fleet Corporation was an agency of U. S. Government 28-29

In the Supreme Court of the United States

October Term 1920

No. 206

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
JAMES H. STRANG, HENRY C. THOMAS and LEROY W. WALTER,
Defendants in Error.

In Error to the District Court of the United States in and for the Southern District of Florida.

BRIEF OF COUNSEL FOR DEFENDANT LE ROY W. WALTER.

PRELIMINARY STATEMENT.

This defendant in error finds it necessary, in reply to the brief of the United States, to make a full statement of both the specifications of errors and the statement of

this case. These statements are made not by reason of any mis-statement of the case by the United States, but simply to more fully and completely state this case. The case is here upon the order of the District Court sustaining a demurrer to an indictment consisting of four counts.

STATEMENT OF THE CASE.

Criminal Statutes Involved.

The statutes upon which the indictment is framed are section 41 of the Criminal Code and section 37 thereof in regard to a criminal conspiracy. Section 41 reads as follows, for the purposes of this case:

> "No member of any firm shall be employed or shall act as an officer or agent of the United States for the transaction of business with such firm."

Substance of the Indictment.

1st Count: That the defendant, James H. Strang, while a member of a firm known as Duval Ship Outfitting Company, acted as an agent of the United States in the transaction of business with the said Duval Ship Outfitting Company *in the manner following, that is to say,* he, the said James H. Strang, *as and while an employee* of the *United States Shipping Board Emergency Fleet Corporation in the capacity of inspector, executed* and signed a certain order in the words and figures following, to-wit: (the order is set out in full, with signatures) signed E. K. Sharlow, Assistant in Charge of Ship Construction, By J. H. Strang, Chief Inspector; that the de-

fendants Thomas and Walter, well knowing the premises did aid and abet the said James H. Strang in the said offense in the manner and form aforesaid to do and commit, contrary, etc. (Record p. 1).

2nd Count: The second count is identical with the first count, except that the order signed and executed is a different date and substance, and is signed "E. K. Sharlow, District Supervisor, By J. H. Strang, Traveling Inspector." (Record p. 1-2).

3rd Count: Same as first count, except date and substance of order, which is signed same as order in second count. (Record p. 2-3).

4th Count: This count attempts to charge a criminal conspiracy. The allegations briefly are as follows: Strang, Thomas and Walter combined, agreed and conspired together to commit an offense against the United States, that is to say, that said James H. Strang, while a member of Duval Ship Outfitting Company acted as the agent of the United States in the transaction of business with said D. S. O. Co. in the making of contracts with and giving orders to said D. S. O. Co. for certain repairs and alterations to be made upon, in and about a certain vessel theretofore constructed by the U. S. S. B. E. F. Corp. and for the furnishing of certain work, labor, services and materials, in the making of said repairs and alterations upon the vessel "Lone Star;" that in pursuance of said unlawful combination, agreement and conspiracy, and to effect the object thereof, the said James H. Strang executed the three written orders set forth in counts 1, 2 and 3, which are set forth in full: Contrary etc. (Record pp. 3-4-5).

Demurrers to Indictment.

The demurrer of Walter set forth two grounds:

1. Said indictment fails to set forth or charge any crime or offense against the laws of the United States.

2. There are not sufficient facts alleged in said indictment and each count thereof, charging any offense or crime under the laws of the United States. (Record p. 5).

Demurrer of James H. Strang.

The demurrer of Strang set forth six grounds.

1 and 2. These grounds are practically same as Walter demurrer.

3, 4 and 5. The conspiracy is not sufficiently charged.

6. Said indictment shows on its face that this defendant was not an agent of the United States Government, as alleged therein, but was agent for a corporation under the laws of the District of Columbia. (Record p. 6).

Order Sustaining Demurrers.

The court sustained both the demurrer of Walter and Strang, in the following words:

> "It is considered by the court that said demurrers be and each of them is hereby sustained. Rhydon M. Call, District Judge." (Record p. 7).

District Court's Opinion.

Following the *order* of the court the lower court wrote an opinion. I desire this court to note carefully the word-

ing of that *opinion.* The brief of the United States is misleading as to just what the lower court held. The lower court said: "The decision of this demurrer depends *primarily* upon whether James H. Strang was an *officer or agent* of the United States. It is clear he was not an *officer.* The United States Shipping Board Emergency Fleet Corporation is a corporation created for public purposes, and, so far as my information goes, the United States is the sole stockholder; *but it is a legal entity with powers to sue and be sued.* It employs its agents, prescribes their duties, and fixes their compensation. I can not see by what course of reasoning *its employees* can be held to be *agents* of the United States." (Record p. 7). (Italics mine).

Assignment of Errors.

The United States has assigned six errors in this case, but the error relied upon is the sustaining of the demurrers of Walter and Strang. (Record p. 9).

THE FINAL ISSUES.

Upon the indictment, demurrers thereto, order sustaining the demurrers and errors specified, this defendant submits the following are the main and final issues involved:

Issue I.

James H. Strang was not an officer of the United States.

Issue II.

James H. Strang was not an agent of the United States.

Issue III.

James H. Strang was nothing more than an EMPLOYEE of the United States Shipping Board Emergency Fleet Corporation, acting under E. K. Sharlow and merely an inspector.

Issue IV.

The United States Shipping Board Emergency Fleet Corporation is not the United States, but a corporation.

POINTS AND AUTHORITIES.

Issue I.

James H. Strang was not an officer of the United States.

Point I.

An *office* is a public station or employment conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument and duties.

United States vs. Hartwell, 6th Wall. 393.

"An officer of the United States can only be appointed by the President, by and with the advice and consent of the senate, or by a court of law, or the head of a department."

U. S. vs. Germaine, 99 U. S., 508.
U. S. vs. Mouat, 124 U. S., 303.

U. S. vs. Smith, 124 U. S., 525-33.

Clause 2, Sec. 2, Article II Constitution of U. S.

There is no allegation in the indictment that Strang was appointed as an officer by any court of law, or the head of a department, nor is there any law requiring such appointment.

U. S. vs. Smith, 124 U. S., 525-33.

> "The courts of the United States are presumed to know the General Statutes of Congress, and any averment in an indictment inconsistent with a provision of a statute of that character must necessarily fail, the statute negativing the averment. * * * There must be therefore, a law authorizing the head of a department to appoint clerks of the collector before his approbation of their appointment can be required, and no such law is in existence."

U. S. vs. Smith, 124 U. S., 525-533.

ISSUE II.

James H. Strang was not an agent of the United States.

Point 1.

The allegations in the indictment are to be construed as a whole, and while it is alleged that Strang "*acted* as an agent of the United States," it is nowhere alleged that he was in fact an agent of the United States. The allegations of the first, second and third counts expressly

qualify the statement that Strang was an agent, in the following words, "that is to say, he, the said James H. Strang, as and while an employee of the United States Shipping Board Emergency Fleet Corporation in the capacity of inspector." Further, the written orders show he was "Chief Inspector" (1st count. p. 1 of Record) and "Traveling Inspector" (2nd and 3rd counts pp. 2 and 3 of Record) and in the fourth count, the written orders show he was such an inspector (p. 4 of Record).

Point 2.

Section 41 of Criminal Code was aimed at either an officer or an agent of the United States. It did not apply to a mere clerk, servant or employee.

The United States itself being a corporation, the Emergency Fleet Corporation at most was but a public corporation acting as an agency for the United States, and the Statute, (Section 41 Criminal Code) upon which this indictment is based, was directed at the *officers and agents of the United States* and *not the officers and agents of public corporations*, acting as agencies of the United States.

The United States is a corporation.

U. S. vs. Bradley, 10 Peters, 343.

Dugan vs. U. S., 3 Wheaton, 172.

U. S. vs. Maurice, 2 Brock, 96, 109.

Fed. Cases No. 15, 747.

Before a man can be punished his case must be plainly and unmistakably *within the statute.*

U. S. vs. Brewer, 139 U. S., 278.

An offense which may be the subject of criminal procedure is an act committed or omitted in violation of a public law, either forbidding or commanding it.

U. S. vs. Eaton, 144 U. S., 677.

An agent is one who stands in the place of his principal and is his representative.

2 Corpus Juris, pp. 420-421.

It appears from the indictment that Strang was merely an inspector under one Sharlow, who at most was an agent of the Emergency Fleet Corporation, which at most was an agency of the United States, and it can hardly be said that Strang was or is an agent of the United States.

> "There can be no constructive offense, and before a man can be punished, his case must be plainly and unmistakably within the statute."

U. S. vs. Lacher, 134 U. S., 624.

The Supreme Court of the United States, in the case of U. S. versus Hartwell, 73rd U. S., 385-402 (18th Law Ed. p. 833) in considering a penal statute which provided that "any president, cashier, teller, director or other officers of any bank or banking association who shall violate any of the provisions of this act, shall be deemed and adjudged guilty of an embezzlement of public money and punishable as provided in Section 2 of this Act" held

in the above case as follows: "This clause is limited in its terms to the officers named in it. There is nothing which extends it beyond them. It cannot, by construction, be made to include any others. It is confined to officers of banks and banking associations. The defendant is not brought within the Act by the averments contained in the counts of the indictment, which are founded upon it. They describe him only as a clerk in the offices of the Assistant Treasurer at Boston. As such, the Act does not affect him, and the court has no jurisdiction of the offenses charged."

As stated before, the only act showing any transaction of business was that James H. Strang "executed and signed a certain order" which order is set forth in the indictment. We contend that neither the word "execute" nor the word "sign" in and of itself is sufficient to show what is prohibited by the Statutes, namely, "the transaction of business." To simply allege that a party executed and signed an order is not sufficient to show that that was the transaction of business. The word "execute" under any number of Court decisions, can be held to mean nothing more than that the party signed a written order as an employee, acting under the authority and direction of his superior. When we look at the order set forth in this indictment, if the Government should prove that James H. Strang sat in his office as an employee under E. K. Sharlow, and at the direction of Sharlow, filled out and prepared an order in the words and figures set forth in the indictment and then signed the same by himself (Strang) as chief inspector, according to the allegations of this indictment, then Strang will have committed an offense against the United States. We contend that no such loose and indefinite allegation should be allowed to

stand, requiring the defendant to go to trial upon any such statement of facts and there is absolutely nothing in this indictment which would require the Government to prove other than what I have stated. The Court knows that under such a statement of facts there could be no possible conviction of any one. Therefore, if the indictment is susceptible of such a statement of facts being proved, there being no allegation in the indictment requiring the Government to make other proof, we insist that the indictment is too vague, indefinite and uncertain to charge an offense. If there were allegations in the indictment to the effect that under and by authority and direction of Jas. H. Strang, he, the said Strang, issued an order as set forth in the indictment, it might be said that that would be sufficient to charge that Strang was transacting business between the Emergency Fleet Corporation and a firm of which he was a member, but there are no allegations that this order was more than executed and signed by Strang and there is nothing to show that it was executed or signed at his direction or insistence or by his authority as an agent of the United States.

ISSUE III.

James H. Strang was nothing more than an employee of the United States Shipping Board Emergency Fleet Corporation, acting under E. K. Sharlow, and merely an inspector.

Point 1.

The indictment in the first three counts describes Strang "as and while an employee" (pages 1 and 2 of

Record). The fourth count describes Strang as "chief inspector and traveling inspector," (pages 3, 4 and 5 of Record).

"An agent is defined to be one who acts for or in the place of another by authority from him; one who undertakes to transact some business or manage some affairs for another by authority and on account of the latter and to render an account of it. He is a substitute, a deputy, appointed by the principal, with power to do the thing which the principal may or can do."

2nd Corpus Juris, p. 420.

"The relations of principal and agent and master and servant are frequently confused." The essential distinction is that the agent is employed to establish contractual relations between his principal and third persons, while the servant is not. The servant deals with *things;* if he deals with persons, it is not to bring about contractual relations and if he contracts for his employer with third persons, he then becomes so far an agent.

2nd Corpus Juris, p. 423.

"The characteristic of the agent is that he is a business representative. His function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between his principal and third persons."

Mechem on Agency, p. 21, Sec. 36.

"A servant is one who is employed to render personal service to his employer, otherwise than in

the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master."

Mechem on Agency, p. 21.

"'The distinction between a person and an agent' it is said by Mr. Justice Holmes in his Edition of Kents's Commentaries 'is the distinction between *serving* and *acting* for.'"

"'The great and fundamental distinction between a servant and an agent' said Professor Dwight (Persons and Personal Property, p. 323) 'is, that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such a contract.'"

"Huffcut on Agency, 2nd ed. Sec. 4 says: 'An agent represents his principal in an act intended, or calculated, to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one.'"

Mechem on Agency, p. 20, note 10.

"The true distinction between an agent and a servant is that already indicated, namely, the distinction between representing another in business dealings with third persons, and working for or serving another when no contractual obligations or relation is to result."

1st Mechem on Agency, p. 23.

"A statute aimed at employment by 'servants' will not necessarily extend to employment by agents."

1st Mechem on Agency, p. 24, Sec. 39.

"The distinction which has generally been made is that the function of an agent is to enter into contract relations with third persons for and in behalf of his principal and usually, in that connection, to determine the mode of effecting the desired purpose without being under the direct control of the principal. That is, an agent does some act, in a manner suggested more or less by his discretion or judgment, which has the effect to establish a contractual relation between his principal and a third person. On the other hand, servants are persons who are employed by, and are subject to the direction and control of, the master, usually for a definite period and at fixed wages or salary, and whose duties require them to perform some service which does not result in a contract between the master and another."

1st Clark & Skyles on Law of Agency, p. 8 and notes.

Singer Mfg. Co. vs. Rahn, 132 U. S., 518.

In the above case, in the Supreme Court of the United States it was said that the relation of master and servant exists whenever the employer retains the right to direct the manner in which the contemplated business shall be done, as well as the result to be accomplished, or, in other words "not only what shall be done but how it shall be done."

Singer Mfg. Co. vs. Rahn, 132 U. S., 518.

See New Orleans vs. Hanning, 15 Wallace (U. S.) 649.

" 'To put the whole matter shortly, an agent is one really or ostensibly authorized to create, voluntary antecedent or primary obligations for his principal in favor of third persons, or to acquire such obligations for his principal as against third persons; while a servant is one authorized to perform separate acts not creating primary obligations, but which may result in the breach of antecedent primary obligations, voluntary or involuntary.' "

1st Clark and Skyles on Agency, p. 10, note 24,

Point 2.

Strang was merely an employee, acting as an inspector, as shown by the foregoing authorities.

From the above definitions, and many others which might be cited along the same line, the Court will see that the particular act or acts alleged to have been done by Strang, were the acts, not of an agent, but the acts of a servant. The orders which were issued showed, upon their face, that they were orders issued by E. K. Sharlow who was himself the only agent, either of the United States or of the Emergency Fleet Corporation. The orders, upon their face, show that Strang was nothing more than an inspector and the word "inspector" itself shows and purports to show that a party occupying such a position has nothing to do with the making of contractual relations but occupies simply the position of a servant or employee to inspect things which have been done. Strang's position, as defined by the orders, clearly shows that he was not to do anything or to make contractual relations with others, but that his only duty and authority would be to inspect what had already been

done. The order further shows that Strang was simply a servant acting for his master E. K. Sharlow. Sharlow was the one who issued the orders creating contractual relations between the Duval Ship Outfitting Co. and the Emergency Fleet Corporation. Therefore, we contend that notwithstanding the general allegations in the indictment that Strang was an agent of the United States, the specific and express allegations of the indictment, and the orders set forth, modify and control the general allegations that Strang was an agent of the United States in that the indictment itself says that he was the agent of the United States and acted as an agent of the United States "in the manner following that is to say, he, the said James H. Strang, as and while an employe of the United States Shipping Board Emergency Fleet Corporation, in the capacity of inspector, executed and signed a certain order," etc. In other words, the general allegation is that Strang was an agent, qualified, and it is shown how and in what manner he was an agent, and by the showing made, it clearly appears that he was not even an agent of the Emergency Fleet Corporation, but simply an employee; that he was acting as a servant for Sharlow; that the orders were under the authority and direction of Sharlow and that his (Strang's) position was nothing more than that of a servant or inspector and that he, Strang, did not come within the above definitions under the law of an agent.

Unless it clearly appears from the indictment that Strang was an agent of the United States, then the demurrers should be sustained. No defendant ought to be put to trial in a criminal proceeding on such uncertain and indefinite allegations as to the real relationship of one of the parties when, in order to constitute a crime, it

should be clearly, definitely and positively shown, without anything to the contrary, that one of the parties was an agent of the United States.

In order words, we contend that under this indictment, the defendant, if the indictments are sustained, would be met with such proof as the following, upon a trial of the case, which proof would not be sufficient to convict, and still would be all that the indictment called for, namely, that James H. Strang was an employee of the Emergency Fleet Corporation, being employed as an inspector, that he signed as an inspector, in the name of and by the authority of E. K. Sharlow, certain orders as an inspector or employee. It would not be necessary for the Government to show anything other than the above, and under the allegations of the indictment, the Government would be entitled, as to that phase of the case, to a conviction. We contend that no defendant should be brought to trial upon such a vague, uncertain and indefinite statement of the fundamental and essential relationship which must have existed between Strang and the United States. If this indictment had simply alleged that Strang was an agent of the United States, and it had not been qualified by other allegations, then we will have to admit that the indictment, upon its face, was good, but inasmuch as the Government has seen fit to show in what manner Strang was an agent of the United States, if those allegations show he was not an agent, but merely a servant or employee of the Emergency Fleet Corporation, then we contend that the demurrer should be sustained and the Government is bound by its own allegations.

ISSUE IV.

The United States Shipping Board Emergency Fleet Corporation is not the United States, but a corporation.

Point 1.

Congress having authorized the United States Shipping Board, composed of five commissioners (Acts of Congress of Sept. 7th, 1916, Sec. 3 and 11) to form a corporation under the laws of the District of Columbia, and to subscribe for and hold not less than a majority of the stock of such corporation, to sell the minority stock or all stock, thereby divested the United States Government, so far as concerns the transactions of that company, of its sovereign character and the Government thereby took the character of a private citizen.

In the case of the Bank of the United States vs. The Planters Bank of Georgia, 9 Wheaton 904-7-8, Chief Justice Marshall said:

> "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters Bank of Georgia is not the state of Georgia, although the state holds an interest in it."
>
> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is

to be transacted. Thus, many states of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act."

"The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank in the sense of the constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter."

The case of United States vs. Planters Bank (supra) was followed by Bank of Ky. vs. Wister, 2 Peters, 318 in which this court said:

"The defendants pleaded to the jurisdiction on the ground that the State of Kentucky was *sole proprietor of the stock* of the bank, for which reason it was insisted that the suit was virtually against a sovereign State. To this plea the plaintiffs demurred, and the circuit court of Kentucky having decided in favor of its jurisdiction, that decision is made the first ground of error in the present suit."

"But this court is of opinion that the question is no longer open here. The case of the United States Bank vs. The Planters Bank of Georgia was a much stronger case for the defendants than the present for there the State of Georgia *was not only a proprietor, but a corporator.*"

The court then added:

"If a state did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the Constitution, no doubt the State here intended to avoid."

Will this Court now say that all the obligations created by the Emergency Fleet Corporation are obligations of the United States, in the face of the Acts of Congress, and particularly Section *13* of the Act creating the U. S. Shipping Board, where it was provided, "For the purpose of carrying out the provisions of sections five and eleven no liability shall be incurred exceeding a total of $50,000,000.

The two cases above were followed by the case of Briscoe et al. vs. The Bank of Kentucky, 11 Peters, pages 257-324-325-326-327, affirming and amplifying the principles announced in the foregoing cases. I quote herewith a few paragraphs from this case as follows:

"These extracts cover almost every material point raised in this investigation.

"They show that a State, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution, and that this is equally the case, whether it own a whole or a part of the stock of the bank."

"If, in becoming an exclusive stockholder in this bank, the State imparts to it none of its attributes of

sovereignty; if it holds the stock as any other stockholder would hold it; how can it be said to emit bills of credit? Is it not essential to constitute a bill of credit, within the Constitution, that it should be emitted by a State? Under its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The State as a stockholder bears the same relation to the bank as any other stockholder."

"The funds of the bank and its property, of every description, are held responsible for the payment of its debts, and may be reached by legal or equitable process. In this respect, it can claim no exemption under the prerogatives of the State."

"And, if in the course of its operations its notes have depreciated like the notes of other banks, under the pressure of circumstances, still it must stand or fall by its charter. In this its powers are defined, and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case."

"We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky; and, consequently, that the notes issued by the bank are not bills of credit, within the meaning of the Federal Constitution."

In the case of Curran vs. State of Arkansas, 15th Howard, pages 304, 308, 309, this court said:

"And first, as to the character of the parties. By the charter of this Bank, the State of Arkansas became its sole stockholder. But the Bank, was a distinct trading corporation, having a complete sepa-

rate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock, provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors were in no way affected by the fact that a sovereign state paid in its capital, and consequently became entitled to its profits. When paid in and vested in the corporation, the capital stock became chargeable at once with the trusts, and subject to the uses declared and fixed by the charter, to the same extent, and for the same reasons, as it would have been if contributed by private persons."

"That a state, by becoming interested with others in a banking corporation, or by owning all the capital stock, does not impart to that corporation any of its privileges or prerogatives, that it lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege in respect to those transactions not derived from the charter, has been repeatedly affirmed by this court, in The Bank of the United States v. The Planters' Bank, 9 Wheat. 904; Bank of Kentucky v. Wister et al, 3 Pet., 431; Briscoe v. The Bank of Kentucky, 11 Id., 324; Darrington et al. v. The Bank of Alabama, 13 How., 12. And our opinion is, that the fact that the capital stock of this corporation came from the State which was solely interested in the profits of the business, does not affect the complainant's right, as a creditor, to be paid out of its property; a right which, as we have seen, follows the fund into the hands of every person, save a bona fide creditor or purchaser, and which a court of equity is bound to enforce by its decree against any party except such a creditor or purchaser capable by law of being brought within its jurisdiction."

In the case of Union Pacific Railroad Company vs. United States, 99 U. S. (25 L. ed. page 501), the Supreme

Court of the United States referring to that corporation said: This corporation is a creature of the United States and it is a private corporation created for public purposes and its property is to a large extent devoted to public uses. It is therefore subject to legislative control so far as its business affects the public interests.

R. R. Co. vs. Iowa, 94 U. S., 155.

And further, in the Union Pacific case above, the court said:

> "No change can be made in the title created by the grant of the lands, or in the contract for the subsidiary bonds, without the consent of the corporation."

The result of the above decision was that regardless of what rights of amendment or regulation Congress might have as to the corporation authorized to be created and regardless of the interests of the Government in that corporation, the court held that the corporation was a private corporation, that it was no part of the Government and that the corporation had a right to insist upon any and all contracts which the Government had made with it.

Salas vs. United States, 234 Fed., 842, was a writ of error to reverse a judgment finding defendant guilty of a conspiracy to defraud the United States in violation of Section 37 of the Penal Code. The conspiracy alleged consisted in an agreement between three persons to share in the profits to be made by the sales of a certain brand of tobacco by defendant and one of the others to the Panama Railroad Company of a department of which the third alleged conspirator was manager and charged with the duty of ordering and passing upon the tobacco and approving the vouchers therefor. The evidence showed

that the United States had, for the purposes of its own, continued the original corporate organization of the railroad company and was the owner of the whole capital stock of the railroad company, absolutely dominating it and being the only one profiting or losing by its operation and that the railroad company sues and is sued in its own name, just as any other corporation. The theory on which the judgment below was based was that the railroad company was a governmental department and that the department manager, though on the pay roll of and paid by the company, was in fact an officer of the United States. The Circuit Court of Appeals refused, however, to accede to this view, but held that on entering into a commercial business the United States abandoned its sovereign capacity and was to be treated like any other corporation and reversed the judgment, citing in support of its view Bank of United States vs. Planters' Bank, 9 Wheat. (U. S.) 904, 6 L. Ed., 244.

A state does not figure as sovereign in lending its credit to a railway company.

White vs. R. R. Co., 7 Heisk, 547.

Where a state owns stock in a railway company, the corporation and officers may sue to the same extent as a corporation owned wholly by individuals.

Southern Ry. vs. N. C. R. Co., 81 Fed., 600.
Lord & Burnham Co. vs. U. S. S. B. E. F. C., 265 Fed. Rep., 955 citing 190 U. S., 406 and 256 Fed. Rep., 772 and 115 U. S., 567.
Ingram etc. vs. U. S. S. B. E. F. C., 267 Fed., 283.
See also 261 Fed. Rep., 440-716 and 266 Fed. Rep., 896.

A railroad company is liable to be sued notwithstanding the fact that the state may be its sole corporator and proprietor.

W. A. R. R. Co. vs. Taylor, 6 Heisk, 415.

Point 2.

The United States Shipping Board Emergency Fleet Corporation was not an agency of the United States.

The Act of September 7th, 1916 section 11 provided that the United States Shipping Board might form under the laws of the District of Columbia one or more corporations for the purposes stated therein; that the total capital stock should not exceed $50,000,000; that the Board have and on behalf of the United States should vote not less than a majority of the stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States. It was further provided that at the expiration of five years from the conclusion of the present European war, the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the *said corporation shall stand dissolved;* the vessels and other property of any such corporation shall revert to the Board; all stock in such corporations owned by others than the United States at the time of dissolution shall be taken over by the Board at a fair and reasonable value and paid for with funds to the credit of the Board. It is provided in section 13 of said act that no liability in carrying out the provisions of sections 5 and 11 should be incurred exceeding a total of $50,000,000.

From the foregoing provisions, it clearly appears that Congress contemplated the difficulties which might be

met with in building up a merchant marine if parties were forced to contract with the United States Government, which could not be sued upon breach of its contracts. Congress therefore, authorized the creation of one or more corporations which could be sued by any parties contracting with the corporation. *The corporations* were not created as agencies of the Government, but as separate legal entities which could sue and be sued if necessary by any parties dealing with a corporation. Congress provided for the appropriation of moneys to purchase the capital stock in these corporations, and later on provided for the appropriation of funds which might be used by the corporations, but it also authorized the investment by outside parties in these corporations, and provided what should happen upon the dissolution of the corporation and how the stockholders should be taken care of. There is no provision of Congress anywhere which makes the United States liable for the debts or obligations of any corporations which might have been created by the United States Shipping Board. How can it be said that the United States Government is liable on contracts made by the Emergency Fleet Corporation as an agency of the United States Government?

The contention of the United States in this case is that the United States is the principal, and that the Emergency Fleet Corporation is simply an agent. There is nothing in the provisions of any of the acts of Congress which expressly provided that the Emergency Fleet Corporation could or should act as an agent for the United States. It is contended however, that by implication such are the purposes of Congress in view of the various acts of Congress and the way in which the

Emergency Fleet Corporation was managed and controlled.

In order to arrive at this implication of agency, it is necessary for this court to overrule all of the principles of law which had been announced for years previously, and which were well known to the members of Congress when the Act of 1917 and subsequent Acts were passed by Congress, in regard to the United States Shipping Board, and the creation of corporations by such Board. This court will hardly overrule all of the principles of law announced by its own decisions in order to create the relationship of principal and agent by implication.

Point 3.

The error of argument by the United States in claiming that Emergency Fleet Corporation is an agency of the United States, and that it has no other capacity than that of Government agent consists in this, namely, that contrary to the principles announced by this court, the United States contends that by reason of the fact that the United States furnished the money for the capital stock, the working capital and other assets of the Emergency Fleet Corporation, and elected its officers and controlled and managed its business that thereby the United States gave to the Emergency Fleet Corporation a sovereign character, and made it a part of or agent of the Government whereas, the law as announced by this court is "when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company of its sovereign character, and takes that of a private citizen. *Instead of communicating to the company its privileges and its prerogatives, it*

descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted;" and further, "it was a distinct trading corporation having a complete and separate existence, enabled to enter into valid contracts binding itself alone, and having a specific capital stock provided, and held out to the public as the means to pay its debts. The obligations of its contracts, the funds provided for other performances, and the equitable rights of its creditors were in no way affected by the fact that a sovereign state paid in its capital, and consequently became entitled to its profits."

In other words, the Government's contention is that the Emergency Fleet Corporation became an agent of the United States, that the United States did not lay down its sovereignty by becoming the incorporator and sole stockholder of the Emergency Fleet Corporation; that the furnishing of money to the Emergency Fleet Corporation and the controlling management of the corporation by the United States Shipping Board instead of divesting the United States of its sovereignty simply created the Emergency Fleet Corporation an agency of the United States. If such was the intention of Congress in the face of previous decisions of this court as to the law, why should Congress have authorized a corporation as an agent to exercise as an agent the sovereign character of Government? It seems more reasonable to believe that Congress knowing the decisions of this court meant to create not an agency, but a separate legal entity, and to avoid certain liabilities on the part of the United States.

The only agency under the Acts of Congress which was provided was the United States Shipping Board and

its five commissioners. There is no provision in any of the Acts of Congress which authorize these commissioners to delegate their authority to the corporations which were authorized to be formed. The only agents of the Government were commissioners.

Point 4.

The indictment in this case nowhere alleges that the United States Shipping Board Emergency Fleet Corporation was acting as an agent of the United States.

The court will notice from the indictment that there is no attempt by the United States in the language of the indictment to claim that Jas. H. Strang was employed by an agent or agency of the United States. *This entire question of agency is one of argument only, and is outside of the allegations of the indictment.*

The indictment alleges that Jas. H. Strang as and while an employee of the United States Shipping Board Emergency Fleet Corporation in the capacity of inspector, executed and signed a certain order which was shown to be an order from the Emergency Fleet Corporation. There is no allegation anywhere to the effect that the United States Shipping Board Emergency Fleet Corporation was an agent of the United States, or that it was the United States, and consequently it cannot be said that upon the face of the indictment Jas. H. Strang acted as an agent of the United States for the transaction of business between the United States and a firm of which he was a member. It is not alleged that the business was between the United States and the Duval Ship Outfitting Co., and that the Emergency Fleet Corporation was acting as the agent of the United States in the transaction

of business between the United States and the Duval Ship Outfitting Co.

Point 5.

Indictment in this case does not show by any express allegations that the S. S. "Lone Star" was the property of the United States, or that the United States had any interest therein.

In this case the United States has referred to the case of the Lake Monroe, 250th U. S., 246, with a statement that "while that case on its facts is not a direct authority upon the question here present, the opinion leaves no doubt as to what view this court entertained as regards the status of the Fleet Corporation."

We contend that the above case is clearly distinguishable from the present case. This court in the Lake Monroe case was dealing with property which was said to be registered in the name of the United States, and to be owned by the United States. In the present case there is no allegation that the "Lone Star" was the property of the United States, or owned by the United States, or registered in the name of the United States; in fact the indictment fails to show who really owned the "Lone Star." If it was the property of the Emergency Fleet Corporation and title thereto was held by Emergency Fleet Corporation, then it was not the property of the United States, as we contend and the doing of repairs of work upon the "Lone Star" was not the transacting of business in regard to or upon property of the United States.

REPLY TO BRIEF OF UNITED STATES.

1.

The contention of the United States briefly is, that the Emergency Fleet Corporation is a public corporation, an agency or instrumentality of the United States, formed solely as an arm of the United States and so treated by the President; that its acts are the acts of the United States; *"wherefore, the defendant Strang, in placing orders with the Duval Company on behalf of the Fleet Corporation, necessarily acted as an agent of the United States."*

2.

And further, that Section 41 of Criminal Code was designated to prevent frauds *on the United States due* to collusion between *its agents* and those with whom they transact business; that the assets and property of the Emergency Fleet Corporation are the assets and property of the United States, and consequently *any fraud against the Fleet Corporation would be a fraud against the United States.*

The above contentions may be considered under the following heads:

1.

Admitting for the sake of argument, that the Emergency Fleet Corporation is all contended for, the conclusion of the government's counsel, "wherefore the defendant Strang, necessarily acted as an agent of the United States" is erroneous.

(a) The Emergency Fleet Corporation, as pointed out heretofore, was a separate legal entity, and simply acted as *an agent* responsible to its principal (United

States), and did not acquire any sovereignty of government; nor did the United States impart its sovereignty to the Emergency Fleet Corporation as its agent.

(b) An employee of the Emergency Fleet Corporation, acting under another agent or employee of the Emergency Fleet Corporation, which was only an agent of the United States, would make the employee, Strang, only an employee or agent of the Emergency Fleet Corporation, and *not an agent of the United States.*

(c) Strang, if an agent of the United States would be able to bind the United States by contract. It appears, however, from the orders signed that he had no such authority, but merely acted under Sharlow.

2.

As to the second contention of the Government's counsel, that a fraud against the Emergency Fleet Corporation is a fraud against the United States, and covered by Section 41 of Criminal Code.

(a) Congress limited Section 41 of the Criminal Code to officers and agents *of the United States,* and not to officers or agents of a corporation in which the United States was a stockholder, as it did in amending Section 5438 Rev. Stats. by the Act of October 23rd, 1918.

(b) The United States is itself a corporation; and the Emergency Fleet Corporation is a separate and distinct corporation. A fraud against the United States would be a fraud against a separate corporation—it would be against the government in its sovereign character, whereas a fraud against the Emergency Fleet Corporation would be against a creature under the corporation

laws of the District of Columbia, *without* any sovereign character.

CONCLUSION.

Briefly the defendant contends:

1. Strang is not an officer or agent of the United States.

2. Strang was merely an inspector or employee of the Emergency Fleet Corporation.

3. The Emergency Fleet Corporation is a separate legal entity and not the United States.

4. The agents of the Emergency Fleet Corporation are not agents of the United States, even if the Emergency Fleet Corporation is an agent or agency of the United States.

5. No offense nor crime against the United States is sufficiently set forth and charged in the indictment.

Respectfully submitted,

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